The BACK BENCHER

Seventh Circuit Federal Defenders

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DEFENDER'S MESSAGE

On behalf of our attorneys, our support staff, and the patron "saint" of all good defense lawyers - Horace Rumpole - we wish each and every one of you a very Merry Christmas, Happy Holidays, and a prosperous and exciting new millennium.

Yours very truly,

Richard H. Parsons
Federal Public Defender
Central District of Illinois

"Crime doesn't pay, but it's a living."

Table Of Contents

CHURCHILLIANA

Once Churchill was sitting on an outside platform waiting to speak to crowds who had paced the streets to hear him. Beside him the chairwoman of the proceedings leaned over and said, "Doesn't it thrill you, Mr. Churchill, to see all those people out there who came just to see you?"

Churchill replied, "It is quite flattering, but whenever I feel this way I always remember that if instead of making a political speech I was being hanged, the crowd would be twice as big."

Dictum Du Jour

"Go, eat your food with gladness, and drink your wine with a joyful heart."

The Bible, Ecclesiastes 9:7

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How could termites have inflicted a $100,000 loss on a $100,000 house, when, after the termites were discovered, the assessed value of the house, according to Normand's lawyer, was $85,000? The maximum award of compensatory damages is the cost of repair or restoration, or the difference between the original appraised value and the post-termite value, whichever is less. Gardynski-Leschuck v. Ford Motor Co., 142 F.2d 955 (7th Cir. 1998). That implies that Normand's compensatory damages do not exceed $15,000. Maybe, however, though this seems highly unlikely, the $85,000 appraisal was made right after the termites were first discovered, and Orkin's subsequent and ineffectual efforts allowed the house to be completely devoured by the critters.

Normand v. Orkin Exterminating Co., slip. op. 10/12/99 (7th Cir.)(Posner, C.J.)

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We don't put much stock in the precise verbal formulations of standards of appellate review. Basically there is deferential review and non-deferential (plenary) review, and whether deferential review is denominated for "abuse of discretion" or "clear error" or "substantial evidence" or any of the other variants (with the exception of a "mere scintilla of evidence") that courts use makes little practical difference.

United States v. Hill, slip op. 11/12/99 (7th Cir.)(Posner, C.J.)

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The regulation allows the cross to be worn when it is attached to a rosary, but not otherwise, even though the addition of a string of beads makes the ensemble more dangerous (it can be used to strangle), and no less suitable as a gang symbol than the cross sole. The rosary is a Catholic religious device. It is not a component of Protestant devotion. The prison authorities opined that Protestants would not be bothered by the presence of the rosary, that they could simply ignore it and concentrate on the cross, but this shows a complete ignorance of religious feeling. One might as well tell Anglicans to kiss the Pope's ring but pretend he's the Archbishop of Canterbury.

Sasnett v. Litscher, slip op. 11/23/99 (7th Cir.)(Posner, C.J.)(citation omitted)(striking down a prison regulation prohibiting the wearing of a plain cross while allowing the wearing of crosses with rosaries).

* * * * * * * * * *

[N]o one yet has had the audacity to argue that imprisoning a person who has children or parents violates the Constitution–that only orphans and recluses can be imprisoned for committing crimes.

Froehlich v. Wisconsin, slip op. 11/10/99 (7th Cir.)(Posner, C.J.).

* * * * * * * * * *

[Defense counsel] moved for a mistrial on the ground that the district judge "sat back in his chair and rolled his eyes and threw his pen down." The judge responded that he may have been shifting in his

chair because he had a bad back. The judge also acknowledged that he may have been exasperated with some of counsel's cross-examination, which appeared to the judge to be irrelevant or calling for speculation by the witness, but that he was confident it did not require a mistrial. ... On this record there is no evidence of the court's bias or hostility and no evidence of prejudice to any defendant by the court's demeanor. Nor is there evidence that the jury noticed anything. It appears that the court may have expressed its displeasure with the examination questions of counsel in a single, isolated incident. ... Expressions of impatience, dissatisfaction, annoyance and even anger, are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display.

United States v. Robbins, slip op. 11/19/99 (Ripple, J.)(citation and brackets in original omitted).

Bon Voyage!

We bid a fond farewell to Tom Patton, Assistant Federal Public Defender in our Springfield Office. Tom has accepted a position with the Federal Public Defender's Office for the Western District of Pennsylvania in their Erie, Pennsylvania Branch Office. Tom's wife, Renee, is from Pittsburgh, and his move will bring them closer to her family. Tom will be leaving at the end of this year. Our loss is surely their gain.

We wish Tom the best of luck.

POSITION ANNOUNCEMENTS

See the Attachments at the end of this newsletter for vacancy announcements for the positions of Assistant Federal Public Defender and Research & Writing Specialist (Attorney).

LET JUDGES BE JUDGES! Downward Departures After *Koon*

By: Alan Ellis, Esq.

[*Editor's Note: This is the fourth of a five-part series of articles on downward departures recognized by the courts since 1996 in light of the Supreme Court's decision in United States v. Koon. Part One discussed "Diminished Capacity", Part Two discussed "Post-Offense Rehabilitation", and Part Three discussed Aberrant Behavior. Part Five, which will be included in the next edition of "The Back Bencher", will feature "Combination of Factors".*]

Part IV
Civic, Charitable, or Public Service

Nowhere has the case law changed as dramatically in light of *Koon v. United States*, 518 U.S. 81 (1996), as in the area of downward departures for civic, charitable, or public service.

The U.S. Sentencing Guidelines (U.S.S.G.) §5H1.1 (Policy Statement) provides that:

"Military, civic, charitable, or public service, employment-related contributions, and similar prior good works are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range."

Prior to *Koon*, those cases that addressed a downward departure based on outstanding charitable and community service work rejected a reduced sentence on these grounds.

In *United States v. Haversat*, 22 F.3d 790 (8th Cir. 1994), the defendant, a high-level business executive convicted in an antitrust, price-fixing case, sought and was granted a downward departure based on his charitable and volunteer activities. In reversing and remanding for a resentence, the court of appeals concluded that Haversat's charitable and volunteer activity, while considerable, would not make him an atypical defendant in antitrust, price-fixing cases noting: "It would appear that high-level business executives, those who are in a position to commit Sherman Act violations, also enjoy sufficient income and community status so that they have the opportunities to engage in charitable and benevolent activities."

The court found that Haversat's activity, while laudable, was not extraordinary as compared to other

similarly situated antitrust defendants. In rejecting Haversat's charitable and volunteer activities as a grounds for a downward departure, the court cited to U.S.S.G. §5H1.10, which states that socioeconomic status is not relevant to a determination of one's sentence. The court of appeals noted that but for Haversat's socioeconomic status, he would not have been able to achieve his worthy record of good deeds.

On the other hand, in *United States v. DeMasi*, 40 F.3d 1306 (1st Cir. 1994), the government successfully appealed a district court's downward departure of 29 months in the calculation of a bank robbery defendant's sentence based on his history of charitable work and community service. The government complained that the court had improperly compared the defendant to "the typical bank robber" and not to other defendants with comparable records of good work. Correctly noting that a §5H1.11(p.s.), departure based on a defendant's record of charitable work and community service falls into the "discouraged-feature" category of justifications for departure, the First Circuit found that the sentencing judge erred by restricting the scope of its comparison to only bank robbery cases holding:

"A court should survey those cases where the discouraged factor is present, without limiting its inquiry to cases involving the same offense, and only then ask whether the defendant's record stands out from the crowd."

Ironically, although in *Haversat*, the defendant's record of charitable and volunteer activities may have been exceptional, the Eighth Circuit did not consider it exceptional when compared to other antitrust violators. Conversely, in rejecting the *DeMasi* defendant's downward departure based on the same ground, the court ruled that the defendant should not be compared only with other bank robbers, but with other defendants from all other cases who similarly had commendable community service records.

In any event, the result in both cases was the same - the downward departure based on charitable work and community service was denied.

Finally, in *United States v. Kohlback*, 38 F.3d 833 (6th Cir. 1994), the district judge also departed downward based on the defendant's record of community ties, civic and charitable deeds, and prior good works. The defendant, Crouse, was the CEO of a large orange juice distributorship charged with fraud by the Food and Drug Administration for adulterating the product. The government appealed Crouse's sentence, arguing that as a white-collar offender, his socioeconomic status enabled him to make extraordinary charitable contributions. Since socioeconomic status is a "prohibited factor" that may not be the basis for a departure, U.S.S.G. §5H1.10 (p.s.), the government argued that Crouse should not have been able to qualify for a charitable deeds departure.

As in *Haversat*, the Sixth Circuit here, too, reversed and remanded for a resentencing finding that in the prosecution of similar white-collar crimes involving high-ranking corporate executives such as Crouse, it is not unusual to find that the offender was involved as a leader in community activities and civic organizations. The court specifically noted that the "guidelines already considered the nature of white-collar crime and criminals when setting the offense levels that governed this offense." (*Id*. at 839).

And then along came *Koon*. On October 7, 1996, the Supreme Court granted Crouse's petition for certiorari, vacated the judgment, and remanded the case to the Sixth Circuit for further consideration in light of *Koon*. (*Crouse v. United States*, 117 S.Ct. 39, 136 L.Ed.2d 3 (1996).)

The court of appeals then remanded the case to the district court for resentencing. On remand, the district court resentenced Crouse exactly as it had sentenced him originally - that is, to 12 months' probation - concluding "that a significant departure based upon good works . . . is in fact merited." The government again appealed, but this time it conceded and the appellate court agreed that civic works were, indeed, a permissible ground for the district court to consider in departing downward. (*United States v. Crouse*, 145 F.3d 786 (6th Cir. 1998).) (The court of appeals, however, expressed concern with the extent of the downward departure granted to Crouse and vacated and remanded for resentencing.)

In another post-*Koon* case, the Second Circuit affirmed a district court's downward departure based on the defendant's charitable fund-raising efforts and civic accomplishments, as well as his poor medical condition. *United States v. Rioux*, 97 F.3d 648 (2nd Cir. 1996), recognized that while "physical condition and civic, charitable and public service and similar prior good works" are both not ordinarily relevant in determining whether the defendant should receive a downward departure, in extraordinary cases the district court may downwardly depart when a

number of factors, which considered individually would not permit a downward departure, combine to create a situation that "differs significantly from the 'heartland' cases covered by the guidelines so as to justify a downward departure." (U.S.S.G. §5K2.2 Cmt.)

In *Rioux*, while noting that many of the defendant's public acts of charity were not worthy of commendation, the court, nonetheless, recognized that the defendant had unquestionably participated, to a large degree, in legitimate fund-raising efforts. This decision stands in stark contrast to *United States v. McHan*, 920 F.2d 244 (4th Cir. 1990), wherein the court criticized the notion that white-collar criminals "need only write out a few checks to charities and then indignantly demand" sentencing reductions, observing that "the very idea of such purchases of lower sentences is unsavory." (*Id*. a t 248).

Thus, it would now appear that prior good deeds may include charitable contributions and fund-raising efforts, as well as the contribution of one's time and efforts towards community service. On the other hand, courts are still likely to look askance at a defendant who writes a $1 million check to the missionary efforts of a Mother Theresa and then seeks a downward departure based on charitable works.

In any even, in light of *Koon*, civic, charitable, public service, and prior good works should not be overlooked by counsel seeking a downward departure, particularly if they exist in a case in which there is another permissible - albeit discouraged - factor for downward departure. (*See, e.g., Rioux, supra; United States v. Bennett*, No. 96-503, 1998 U.S. Dist. LEXIS 7751 (E.D. Pa. May 27, 1998) (defendant exhibited exceptional civic, charitable, public service and good works in area of substance abuse, children and youth, and juvenile justice, that, when combined with extraordinary cooperation, restitution, and a mental health "hybrid" departure involving diminished capacity under U.S.S.G. §5K2.13 and mental and emotional conditions under §5H1.3 justified substantial downward departure in major fraud case); *see also United States v. Wilke*, 995 F.Supp. 828 (N.D. Ill. 1998) (homosexual 46-year-old child pornography defendant was granted downward departure based on combination of exceptional community and charitable activities *and* particular vulnerability to physical abuse while incarcerated).)

Indeed, "combination of factors" may be the most important of all post-*Koon* downward departures. Stay tuned for a full discussion of this ground for departure in Part 5.

Alan Ellis is a former president of the NACDL and has offices in both San Francisco and Philadelphia. He is a nationally recognized expert on sentencing issues and specializes and consults with other lawyers throughout the United States in the area of federal sentencing. He has graciously allowed us to reproduce articles he has written for his quarterly federal sentencing column for the ABA's Criminal Justice magazine.

We extend our sincere thanks and gratitude to Mr. Ellis for sharing his expertise with us.

Flash-Bang We're Home: The Citizen's Castle Under Siege

By: David Mote
Deputy Chief Federal Defender

Once upon a time, in a less politically-correct age, there was a saying: "A man's home is his castle." Today, the phrase might be viewed as quite chauvinistic. Nonetheless, most would agree with the notion it entails that a person's home should be a sanctuary from the outside world.

Regardless of whether it's a man's castle, a woman's castle, or the family castle, it is now subject to siege in the most literal sense. In the infamous "war on drugs" the police have employed tactics reminiscent of the S.S. in Germany during the 1930s and 1940s. Drug raids are often executed in the middle of the night by agents in dark clothing wearing masks. Sometimes the police "knock and announce" their presence and give the citizen perhaps ten seconds to answer the door before a battering ram smashes through the door. Other times, the police enter without knocking and announcing based on either a "no-knock warrant" or "exigent circumstances." In many places, police officers are routinely armed with semi-automatic pistols capable of firing 15 rounds in succession before reloading. One of the more recent developments in the "war on drugs" is the use of the flash-bang grenades in storming the castles of America's citizenry.

"A flash-bang or noise-flash device is a diversionary tool used by law enforcement officers. ... The device emits a bright light and a loud noise. It causes psychological confusion to those near it." United States v. Kingsley, 1998 WL 295577 (D. Kansas 1998)(unpublished). A flash-bang device is sometimes referred to as "distraction device." United States v. Stowe, 100 F.3d 494, 496 (7th Cir. 1996), illustrates

the atmosphere of the raids in which such devices are used:

Later that same morning, at about 5:25 a.m., the emergency response team of the Springfield Police Department weapons drawn and dressed in masks, hoods, and dark clothing, executed the search warrant. A single blow from the team's steel battering ram broke down the door. A "distraction device"–a type of grenade that creates a temporarily blinding flash of light and a loud explosion–was thrown into the apartment. More than ten police officers entered and quickly secured the apartment.

The same atmosphere is evident in United States v. Myers, 106 F.3d 936, 939 (10th Cir. 1007):

"[A]t approximately 6:09 a.m., agents of the [Kansas Bureau of Investigations], dressed completely in black and wielding automatic machine guns, knocked on Mr. Myers front door and announced that they had a search warrant. The agents waited ten seconds, then battered down the door and rolled a Deftec Model 25 distraction device, also known as a "flash bang," into the living room. The device exploded, and the agents then stormed the house, finding Mr. Myers, his wife, nineteen-year-old stepson, nine-year-old stepdaughter, and seventeen-month-old daughter."

In Myers, the court expressed concern: "The use of a 'flashbang' device in a house where innocent and unsuspecting children sleep gives us great pause. Certainly, we could not countenance the use of such a device as a routine matter." Id. at 940. Nonetheless, the use of flash-bang grenades is more routine than the Myers-court may have wished. "In practice, the [Kansas City Police Department] has used the device in about one-half of the cases where a search warrant is executed at a place where drug activity is suspected." United States v. Kingsley, 1998 WL 295577 (D. Kansas 1998)(unpublished).

Myers is by no means the only case in which children were present when such a device was used. In Shepard v. Allen, 1997 WL 150049 (D. Kansas 1997)(unpublished), "[t]he search began with one of the agents throwing a distraction device into the residence. The plaintiff, three of his stepchildren, and one other individual were in the house at the time."

It is indisputable that the used of these explosive devices is dangerous for the occupants of the residence being bombed. Kirk v. Watkins, 1999 WL 381119 (10th Cir. 1999)(unpublished), begins with the now familiar, military-style raid, but with more serious consequences:

"The next morning at approximately six a.m., the [Special Response Team] pulled into the driveway of the Kirk residence and drove to the east side of the house. Officers blasted the lock off the door to the residence. Meanwhile, Watkins went to the bedroom window with a flashbang device, cut the screen and threw the device through the window (breaking it) and into the bedroom."

"Unbeknownst to Watkins, the Kirks had moved their bed from against the wall to a location beneath the window. The flashbang device landed on the bed and started a fire which burned the Kirks, who were lying nude on top of the bed."

"Despite the fact that the district court found that Watkins' action of throwing the flashbang device into a room into which he had not first looked violated both Watkins' training and the instructions on the use of the device, the court of appeals found he was entitled to qualified immunity "because his actions did not violate clearly established law."

Means v. United States, 176 F.3d 1376 (11th Cir. 1999) also involved an explosion that did more than startle the occupants of the

residence. In that case, "County law enforcement officers used a flash bang device to enter the Means residence." After a search of the residence, Wendell Means was arrested. "The flash bang device burned Debra Means's leg, fractured her left small toe, and blew the nail off a toe. Debra Means remained in the hospital for two days and incurred medical expenses in excess of $3,500."

There are also cases that reflect how the use of these explosive devices may increase the risks to the officers. In Jenkins v. Wood, 81 F.3d 988 (10th Cir. 1996), the Jenkins' sued after police, executing a search warrant at 11:40 p.m., threw a flash-bang grenade through the second story entrance. "As it turned out, there was no upstairs apartment .... At the time the Topeka Police officer threw the 'flash bang' through the upstairs entrance, Mr. Jenkins was making his way up his home's internal staircase. As he reached the top of the stairs, the explosion knocked him down the stairs. At this point, Mr. Jenkins became 'aware that these people were all around everywhere shooting and carrying on.' ... Upon hearing the commotion and not knowing who was in his home, Mr. Jenkins ran to grab a shotgun he kept in his bedroom." Although summary judgment for the defendants was affirmed, Judge Henry, concurring, observed that: "The governmental interests served by this commando approach are not apparent." Judge Henry also stated that the defendants "would do well to evaluate their policies (or lack thereof)–whoever makes them and whatever they are–regarding the use of such tactics in the execution of search warrants."

Another example of the increased danger to officers is found in footnote one of the unpublished decision Garcia v. Datillo, 1997 WL 408067 (10th Cir. 1997):

"Officials had targeted plaintiff's brother in a drug investigation and obtained an arrest warrant for the brother and a search warrant for plaintiff's mother's home where both plaintiff and his brother were staying the night of the raid. Defendant alleged that the defendant deputies attempted to execute the warrant without an adequate plan or training. The deputies shot barking dogs at the residence, and used a "stun" or flash grenade, prompting plaintiff's brother to shoot and injure two of the deputies. The deputies then allegedly beat plaintiff before they arrested him.

It also appears that the use of an explosive device increased the danger to all concerned in Shepard v. Allen, 1997 WL 150049 (D. Kansas 1997)(unpublished). The plaintiff was in his bedroom wearing a bathrobe when the device exploded. According to the plaintiff, he came out of the bedroom to check on the explosion and encountered agents in the living room. Plaintiff claimed he had not heard any "knock and announce" and did not know the intruders were police. He further claims that the police shot him twice, and then he charged an officer and grabbed his gun and yelled for someone to call the police. Defendants claim they knocked and announced. Defendants, particularly the officer involved in the shooting, claim that the officer entered the plaintiff's bedroom after kicking in the door and that plaintiff rushed him, grabbed his gun, and was shot twice in the ensuing struggle. Under either scenario, it is hard to conclude that the initial explosion made the subsequent entry into the residence safer for anyone.

In United States v. Baker, 16 F.3d 854 (8th Cir. 1994), the court found that the use of a "distraction device" was warranted because the officers had encountered a barricaded front door in a previous raid on the house and informants reported that there were two Doberman Pinschers inside the house. It seems unclear, however, that large, aggressive dogs will be less of a threat after such a device goes off. If the explosion upset the dogs, they might be more dangerous both to the police and the occupants inside the residence.

One would hope that explosive devices which can start a home on fire would be used only in extreme circumstance. Unfortunately, that is not the case. In United States v. Green, 1994 WL 201105 (10th Cir. 1994)(unpublished), the court demonstrated little concern for the danger involved in the use of flash-bang grenades:

"As to Defendant's assertion regarding the execution of the warrant, there is no evidence in the record to support Defendant's position that use of a "flash-bang" diversionary device in the present instance was excessive force rendering the search unreasonable. No one was injured. No children were present."

In Kirk v. Watkins, 1999 WL 381119 (10th Cir. 1999)(unpublished)(the case in which the couple lying on their bed were burned after the flash-bang device set the bed on fire), the court stated that "[t]he use of a flashbang device is neither per se objectively reasonable nor unreasonable." For now it seems as if the limits of the Fourth Amendment's reasonableness requirement, and of qualified immunity will continue to be litigated

as explosive devices continue to be tossed into residences, defendants challenge the reasonableness of the tactic and citizens attempt to sue over the resulting injuries.

Restitution After The Mandatory Victims Restitution Act (MVRA)

By: Andrew McGowan
Assistant Federal Defender

This article presents a very basic discussion of some practical considerations in cases where restitution will be imposed pursuant to the MVRA (18 U.S.C. §3663A). This article is not a comprehensive discussion of restitution and, therefore, does not specifically discuss special restitution statutes, such as restitution for certain types of sex offenses (18 U.S.C. §2259), restitution under the Dead-Beat Dad Act of 1998 (18 U.S.C. §228(c)), or Community Restitution (See U.S.S.G. §5E1.1(d)). However, this article does include a discussion of the process by which restitution is determined under the MVRA.

Before the Mandatory Victims Restitution Act (MVRA), restitution was determined by how much the defendant could be expected to pay and how much the victim lost as a result of the crime. The defendant's ability to pay took precedence over the amount the victim lost. United States v. Mahoney, 859 F.2d 47, 52 (7th Cir. 1988)("As we well realize, at the time the court orders restitution it is most paramount that the defendant, in the all-important rehabilitative process, have at least a hope of fulfilling and complying with each and every order of the court. Thus, an impossible order of restitution, as made in this case, is nothing but a sham, for the defendant has no chance of complying with the same, thus defeating any hope of restitution and impeding the rehabilitative process."). Of course, this is still the law for crimes that are not a crimes of violence, offenses against property, including any offenses committed by fraud or deceit, or product tampering offenses. 18 U.S.C. §§3663 (Victims and Witnesses Protection Act)(VWPA) and 3663A (MVRA).

In ruling that the MVRA is constitutional, the Seventh Circuit has concluded that "restitution authorized by the VWPA (and mandatorily imposed under the MVRA) is not a criminal punishment for the purposes of the Ex Post Facto Clause." United States v. Newman, 144 F.3d 531, 542 (7th Cir. 1998). Because it does not violate the Ex Post Facto Clause, the MVRA applies to all offenses for which sentencing occurs after April 24, 1996. Even defendants facing resentencing who were originally sentenced before April 24, 1996, and were sentenced under the VWPA, may face resentencing under the MVRA.

Under the MVRA, restitution is now the victim's loss, notwithstanding the defendant's financial resources. A probation officer initially determines the amount of restitution in the Presentence Report (PSR), unless the amount is stipulated in a plea agreement or otherwise. In some cases, how much the court will order in restitution will be self evident. For instance, in a simple bank embezzlement case where the defendant simply took $2,000 from the defendant's teller drawer once, the restitution will be $2,000. However, if the defendant embezzled over time and from other tellers' drawers, the total amount that the probation officer includes in the restitution may include shortfalls from other tellers' drawers simply because they occurred around the same time as the embezzlement. Unfortunately, contesting the amounts may risk losing the acceptance of responsibility adjustment, if the judge finds that the defendant falsely denies or frivolously contests the amounts. U.S.S.G. §3E1.1 Commen. n. 1(a); See also United States v. Wells, 154 F.3d 412, 413-414 (7th Cir. 1998)(Bank Robber who refused to disclose whereabouts of approximately $630,000 to authorities not eligible for acceptance of responsibility. Furthermore, falsely telling arresting authorities that money was stolen from him after he stole it from the bank qualifies defendant for obstruction of justice adjustment).

In some cases, restitution will involve valuing property that was stolen destroyed or not recovered. The value of the property should be no more than the victim would have been able to achieve in a civil action in state court. See United States v. Lowder, 1999 U.S. App. LEXIS 28128 at 18 (7th Cir. Nov. 1, 1999)("the Act seeks to engraft a civil remedy onto a criminal statute, giving the victim of the crime the recovery to which he would have been entitled in a civil suit against the criminal and thus merely providing a procedural shortcut rather than imposing a heavier criminal punishment."). In these cases, the court must determine the property's fair market value. Often, the PSR will simply state that the property is worth x amount of money without an analysis of what factors contributed to this determination. In some

instances, the initial value in the PSR will be based on nothing other than the victim's statement or the property's value when new. Therefore, if the PSR contains no information concerning how the probation officer determined the value of the property, defense counsel should require a more complete accounting. The probation officer is obligated by statute to provide defense counsel with "a complete accounting of the losses to each victim". 18 U.S.C. §3664. Therefore, if the probation officer's accounting is not based on factors such as age, condition, replacement cost, etc., it may not be a complete accounting.

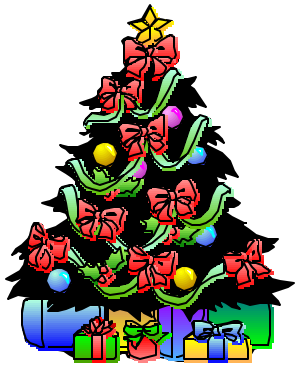
In the more complicated fraud cases, ones that occurred over a long period of time or that involve many victims, determining the amount of restitution usually is much more complicated. For instance, although there will be much evidence in discovery concerning how much money victims lost, the probation officer will send victim impact statements, a questionnaire, to identifiable victims, asking them, among other things, how much money they lost. Absent a court order, probation will generally not disclose the completed victim impact statements to defense counsel. Therefore, in cases where the victim impact statements will be used to determine restitution, defense counsel may make an oral motion at the appropriate hearing to be able to review the victim impact statements that are returned. Perhaps more importantly, defense counsel may have some input into what the victim impact statements actually ask. For instance, in many fraud cases, the victim impact statements do not require documentation to support answers. In those cases, defense counsel could move to have the victim impact statements state that they are to be signed under penalty of perjury. In cases where, as part of the fraud, the defendant paid some money back to the victims, such as in a Ponzi scheme, it is important to make sure that the victim impact statements include a question asking the amount of the money the victim received from the defendant. Furthermore, because the probation officer does not send these victim impact statements out until after the defendant pleads guilty or is convicted, information from them may be received up to the day of sentencing or even after the sentencing hearing. Keep in mind that where "victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victims losses, not to exceed 90 days after sentencing." 18 U.S.C. §3664(a)(5). It is not clear what effect a later determination of restitution will have on the appealability of the conviction or of other aspects of the judgment. To be sure, in a case where the court sentences the defendant but delays the determinating restitution, it would be prudent to file the notice of appeal within ten days of the initial judgement, even though it does include an order of restitution.

There are two other considerations to keep in mind in complicated fraud cases. In the first place, the MVRA provides that it shall not apply in cases where "(A) the number of victims is so large as to make restitution impracticable; or (B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process." 18 U.S.C. §3663A(c)(3)(A) and (B). While neither of these contingencies apply in most cases, one or the other may apply in a case where restitution seems to be particularly difficult to determine, or in a case where there is credible evidence concerning the amount of restitution that conflicts with other equally credible evidence. In the second place, even if the court orders restitution, the court may, in some cases, order that the defendant only be responsible for nominal periodic payments. 18 U.S.C. §3664(f)(3)(B). The court would first have to find that "the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments." Id. Therefore, if the defendant is elderly or is, for some other reason, on a limited or fixed income, the court may essentially relieve the defendant of the obligation of actually attempting to pay off the restitution in the criminal case.

Under the MVRA, interest is negotiable. If the court determines that the defendant does not have the ability to pay interest on the restitution, the court can waive interest, limit interest to a specific dollar amount, or limit the length of the period during which it accrues. 18 U.S.C. §3612(f)(3). Also, the court may order that the obligation to begin payment start at a certain time. See Id. One final consideration is that in cases where restitution is ordered, a fine should not be ordered to the extent that the fine would interfere with the ability of the defendant to pay restitution. 18 U.S.C. §3572(b).

In many cases, the court will order that the amount of restitution is due in full immediately. This "does not

mean 'immediate payment in full;' rather it means 'payment to the extent that the defendant can make it in good faith, beginning immediately.'" United States v. Jaroszenko, 92 F.3d 486, 492 (7th Cir. 1996). Practically speaking, it means that the Bureau of Prisons will take a percentage of the nominal "wages" that the defendant earns while in its custody and will apply it towards the defendant's restitution obligation. After defendants are released from prison, the probation officer assigned to the case will determine how much per month the defendant must pay towards restitution and will monitor the defendant's progress toward paying the ordered restitution. If, at sentencing, the court ordered that a certain amount of restitution be paid every month, the defendant will be required to pay that amount a month, unless the court changes the monthly amount by subsequent order. However, if the court did not order a certain amount be paid a month, then that amount will initially be determined by the probation officer. The probation officer will set the monthly payment amount even though the court may not "delegate to the probation department its authority to establish a payment schedule." United States v. Trigg, 119 F.3d 493, 499 (7th Cir. 1997)("The fixing of restitution payments is a judicial act; a court abdicates its judicial responsibility when it authorizes a probation officer to determine the manner of restitution."). Therefore, if the probation office established the payment schedule, the defendant's inability to pay that amount should only be a factor for the court to consider in any future revocation proceeding. See Trigg, 119 F.3d at 500. Even with a set amount to pay a month, the defendant is only required to make a good faith attempt to pay the restitution. See United States v. Eggen, 984 F.2d 848, 849 (7th Cir. 1993).



If the defendant is unable to pay the full amount of restitution during his or her term of probation or supervised release, that does not mean that the victims are without recourse for the unpaid amount. The debt remains in effect for twenty years. See 18 U.S.C. §3613(b). The victim may proceed against the defendant in the state court where the district court is located. The victim need only obtain an abstract of the judgment that certifies that a judgment for the amount specified in the restitution order has been entered in favor of the victim against the defendant and record the abstract in the state court. 18 U.S.C. §3664(m)(1)(B). The defendant is estopped from denying the essential allegations of the offense. 18 U.S.C. §3664(l). Also, the government may collect the money on the victim's behalf. Furthermore, restitution is non-dischargeable in bankruptcy. See 18 U.S.C. §3613(e). Nevertheless, the most effective collection device against the defendant is, without a doubt, the probation officer's ability to threaten the defendant with further incarceration.

If the government files a petition to revoke based on non-payment of restitution, there is a broad spectrum of possible outcomes, including incarceration. However, to be incarcerated, the defendant must have willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay. Bearden v. Georgia, 461 U.S. 660, 672 (1983); 18 U.S.C. §3614. "If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment." Id.

Restitution is often an afterthought in a criminal case. It is even more tempting to give restitution less attention now that the defendant's ability to pay the amount ordered has been removed as a factor in determining the amount of restitution. However, as this article suggests, there are still nuances to the court ordering restitution under the MVRA. Armed with this knowledge, defense counsel may be able to minimize the harshness of the restitution order.

CA-7 Case Digest

Compiled by: Jonathan Hawley
Assistant Federal Defender

Beginning with this issue, the Seventh Circuit Case Digest will be divided into three section: **Recent Reversals, Recent Affirmances**, and **Non-Summarized Cases**. Within these three sections are all published Seventh Circuit criminal cases decided since the previous issue of *The Back Bencher*. The cases contained in the Non-Summarized Cases section are not summarized because the cases address either routine issues or restate already well-established principles of law. However, each case has a brief parenthetical description indicating the nature of the case which may be useful for a lawyer working on a particular case.

RECENT REVERSALS

Current from October 4, 1999 to present

HABEAS CORPUS

Johnson v. U.S., No. 97-2519 (7th Cir. 11/10/99). On appeal from the district court's denial of the petitioner's §2255 petition, the Court of Appeals held that a motion to amend the petition is not a "second or successive" collateral attack as defined by the AEDPA. Prior to the enactment of the AEDPA, the petitioner filed his 2255 petition in the district court. On the day the AEDPA was enacted and while the petition was still under consideration by the district court, the petitioner sought to amend his petition. The district court, however, held that the newly enacted AEDPA required appellate approval for the amendment because it was a "second or successive" collateral attack. Therefore, the court refused to allow the petition to be amended. The Court of Appeals held because the Rules Governing Section 2255 Proceedings for the United States District Courts do not deal with amendments to motions for collateral review, the district court should have looked to Federal Rule of Civil Procedure 15(a) to determine whether the motion to amend was proper. Under Rule 15(a), even after the defendant has filed an answer and the plaintiff's absolute right to amend has lapsed, courts should still grant leave "freely . . . when justice so requires." As in other civil cases, a prisoner receives one complete round of litigation, which includes the opportunity to amend a pleading before judgment. Accordingly, the district court erred in characterizing the motion to amend as a second or successive petition.

Robinson v. U.S., No. 98-2055 (7th Cir. 11/3/99). On appeal of denial of petitioner's §2255 petition, the Court of Appeals reversed the district court and held that the defendant's convictions for both conspiracy and engaging in a continuing criminal enterprise (CCE) violated the double jeopardy clause of the Fifth Amendment. Applying the Supreme Court's decision in Rutledge v. United States, 517 U.S. 292, 300 (1996), the court held that conspiracy is a lesser-included offense of CCE, and, as such, a court may not impose punishment for both offenses. Moreover, although the defendant pleaded guilty to both charges and such a plea ordinarily bars double jeopardy collateral attacks, no waiver occurs so long as it is clear from "the facts of the record the court had no power to enter the conviction or impose the sentences." In this case, the record clearly demonstrated that the two charges were based on the exact same set of facts, thereby violating the defendant's Fifth Amendment rights.

RESTITUTION

U.S. v. Martin, No. 98-2621 (7th Cir. 11/1/99). In prosecution for mail fraud and giving and receiving a bribe in connection with a federally funded program (18 U.S.C. 666(a)), the Court of Appeals reversed the district court's $12.3 million restitution order pursuant to the Mandatory Victims Restitution Act of 1996. Co-defendant Lowder was an official in the Illinois Department of Public Aid, and after receiving numerous undisclosed gifts from co-defendant Martin, a contractor, Lowder renegotiated a contract whereby Martin's company received $12.3 million for performing unnecessary or worthless work. Although the district court ordered that the defendants pay this amount in restitution, the Court of Appeals held that the record did not support a finding that the illegal scheme "caused" the execution of the amended contract. Specifically, although Lowder clearly accepted bribes from Martin, Martin also engaged in a number of legal activities which influenced the grant of the amended contract. Indeed, Martin made lavish campaign contributions to Governor Edgar's campaign, large donations to the campaigns of legislators, and other large campaign donations to other executive officials. Because restitution is analogous to a civil action requiring proof of causation, these other legal campaign contributions may have caused the execution of the amended contract, and the case was therefore remanded to the district court for a determination of what amount of loss, if any, was caused by the bribes

as opposed to the legal donations.

SENTENCING

U.S. v. Herrera-Ruiz, No. 98-3906 (7th Cir. 11/18/99). In prosecution for conspiracy to possess illegal drugs with intent to distribute, the Court of Appeals reversed the district court's drug quantity calculation and its enhancing of the defendant's sentence because he was a manager or supervisor in the conspiracy. The defendant was arrested after authorities discovered that a Chicago car dealership was also offering illegal drugs for sale. Eventually, authorities discovered 812 kilograms of cocaine and 515 pounds of marijuana in a truck bound for the dealership. At sentencing, the district court used the amounts found in the truck to determine the defendant's base offense level. The Court of Appeals, however, reversed, finding that the defendant was a street-level dealer in the conspiracy. Indeed, when determining drug quantity, the courts must look at the scope of the conspiracy in which the defendant actually joined which may not be coextensive with the overarching criminal enterprise. Thus, in this case, the inclusion of the drug amounts in the truck was improper because no evidence was presented which showed that the defendant was aware of these drugs or that the shipment was within the scope of the agreement into which the defendant entered. Additionally, the Court of Appeals reversed the manager/supervisor sentencing enhancement because the government failed to show that the defendant ever directed the activities of anyone else within the conspiracy, recruited others into the conspiracy, or received a share of the conspiracy's proceeds beyond the profits from his own sales.

U.S. v. Bradley, No. 99-1783 (7th Cir. 11/4/99). In prosecution of a police officer for depriving a person of constitutional rights under color of law in violation of 18 U.S.C. § 242, the Court of Appeals reversed the district court's 18 level downward departure. At trial, the evidence showed that the defendant, a police officer in an unmarked police car, attempted to stop a car which had "rolled" through a stop sign. When the car did not stop, the officer fired a warning shot out the window and then fired a second shot which went through the trunk of the car and lodged in the back of the driver's seat. At sentencing, after summarizing a number of letters received on behalf of the defendant, the district court concluded that a downward departure was warranted for "a single act of aberrant behavior" as allowed by U.S.S.G. §5K2.0. Reviewing *de novo* whether the district court stated adequate grounds to depart, the court held that the district court's reference to the defendant's respect in the community did not adequately address the factors required for a downward departure for aberrant behavior. Rather, the court held that "aberrant behavior" is "more than merely something out of character or the defendant's first offense," but it instead must be "something in the nature of spontaneous, sudden or unplanned." Because the district court did not address any of these factors, the court remanded for re-sentencing.

U.S. v. Cones, No. 99-1292 (7th Cir. 10/28/99). In prosecution for heroin smuggling, the Court of Appeals reversed the district court's six level upward departure based on the purity of the heroin involved. At sentencing, the district court noted that the 250 grams of heroin recovered was at a purity level of 70%. The court then calculated that street level heroin is normally at a purity level of 3% to 7%. Thus, the court calculated that the defendant possessed the equivalent of 2.5 kilograms of street level heroin, and accordingly departed upward, increasing her base offense level by six levels. The Court of Appeals, in rejecting this basis for departing, held that drug purity cannot reasonably be described as a circumstance that the Commission overlooked or inadequately considered. Indeed, the court noted that converting a drug quantity to a uniform purity–whether 100% purity or "street-level" purity–was considered and deliberately rejected by Congress and the courts. Rather, the Guidelines explicitly allow sentencing a defendant based *either* on the amount of pure drug present *or* the total weight of the mixture. Therefore the court held that "judges should not increase the effective quantity at prosecutors' behest on the ground that street-level purity is the superior measure."

RECENT AFFIRMANCES

Current from October 4, 1999 to present

EVIDENCE

U.S. v. Robbins, No. 98-1515 (7th Cir. 11/19/99). In prosecution for conspiracy to distribute marijuana, the Court of Appeals affirmed the defendants' convictions and sentences. Among numerous evidentiary challenges, the defendants argued that the prosecutor engaged in misconduct during closing argument when he stated, "I'm not going to put somebody in this courtroom that would lie to you, or I suspect would lie to you, and ever give them any consideration." Although the Court

of Appeals found that this statement "crossed the line" of proper argument, employing a plain error analysis, the court found that the comment was made in response to the arguments of defense counsel that the governments' cooperating witnesses were lying. Moreover, the court found that the weight of the evidence against the defendants was "substantial and overwhelming."

U.S. v. Thornton, No. 98-2302 (7th Cir. 11/18/99). In prosecution for conspiracy to distribute crack, the Court of Appeals affirmed the defendants' convictions and sentences over numerous evidentiary challenges. In doing so, however, the Court offered a "word to the wise" for prosecutors. Specifically, in addition to introducing into evidence the plea agreements of its cooperating witnesses, the government also introduced into evidence the proffer letters executed by the witnesses. In addition to the five references to truthfulness in the plea agreements, the proffer letters contained three additional references to truthfulness. The court stated that "for more than a decade we have been warning prosecutors to avoid unnecessarily repetitive references to truthfulness if it wishes to introduce the agreements into evidence, and the references to truthfulness in this case came "perilously close to being unnecessarily repetitive." The court went on to state, "If these seemingly duplicative statements are essential to airtight immunity and plea agreements, prosecutors should consider refraining from introducing the documents into evidence and rely instead on testimony summarizing the agreement. If prosecutors want to introduce the actual documents into evidence they should ease up on multiple references to the necessity of complete and truthful testimony." Finally, with respect to the introduction of the proffer letters in addition to the plea agreements, the court stated that this "strikes us as overkill." Specifically, "The proffer letters, which memorialize the framework under which the co-defendants agreed to talk in the first place, seem of scant relevance at trial when a subsequent, superseding plea agreement has been reached. There may come a day in another case when we find excessive the admission of proffer letters containing repeated references to honesty. The government may wish to think twice before risking reversal for the presumably minimal benefit achieved by the admission of these documents." Unfortunately for the defendants in this case, that "day" has not yet come, and the Court of Appeals affirmed their convictions notwithstanding its admonitions.

U.S. v. De La Rosa, No. 98-2045 (7th Cir. 10/29/99). In prosecution for conspiracy to possess cocaine, the Court of Appeals affirmed the district court's refusal to bar the introduction of the defendant's post-arrest statements which, according to the defendant, were not disclosed in a timely manner pursuant to Rule 16(a)(1)(A). Specifically, five days prior to trial, the government for the first time produced a report regarding a post-arrest statement made by the defendant. The defendant argued that had the report been disclosed earlier, he would have filed a motion to suppress. Rather than bar the testimony due to the Rule 16 violation, however, the district court offered to grant a continuance, a request which the defendant declined due to the fact that he had already been held in pre-trial detention for six months. The Court of Appeals, in affirming the district court, noted that the defendant never formally requested discovery as Rule 16 requires. Thus, absent such a request, Rule 16 was not violated. Moreover, even assuming a violation, reversal of the district court's remedy for a Rule 16 violation is warranted only if the remedy was inadequate to assure the defendant a fair trial. In this case, the continuance offered by the district court was adequate, and it cannot be faulted by the defendant's refusal to take advantage of that remedy.

U.S. v. Hook, No. 98-2420 (7th Cir. 10/21/99). In prosecution for theft from an employee-benefit plan, the Court of Appeals rejected the defendant's argument that an administrative termination date of the benefit plan *prior* to the defendant's theft precluded his prosecution. Specifically, the defendant argued that, in a prior civil proceeding, a retroactive termination date of the plan was set prior to the defendant's alleged theft. Thus, according to the defendant, not only was the prosecution estopped from claiming in the criminal prosecution that the plan was in existence at the time of the theft, but also that the pre-theft termination date made it impossible for the government to prove an element of the offense–namely, theft from a benefit plan. In rejecting the defendant's argument, the Court of Appeals noted that benefit plans are often terminated retroactively to ensure that plan members and the corpus of the plan receive equitable treatment. For purposes of criminal liability for theft from the plan, however, the court held that the mere establishment of a termination dates does not terminate an employee-benefit plan. Rather, the court held that during the period between the termination date and the final liquidation of the plan, the plan was legally within the process of termination. Accordingly, the criminal standards as related to theft from the plan continue to apply even after the retroactive termination

date, and the government therefore proved all the elements of the offense.

HABEAS CORPUS

Coleman v. Ryan, No. 98-2784 (7th Cir. 11/10/99). In capital habeas appeal, the Court of Appeals affirmed the district court's denial of the petition. The petitioner was convicted of murdering a nine year old girl after binding and strangling her. He had been previously convicted of murdering two other persons as well. An Illinois jury found him eligible for the death penalty under 2 out of 10 eligibility factors set forth by Illinois law. The first factor was that the petitioner murdered an individual "under 12 years of age and the death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty," a factor which the petitioner argued was unconstitutionally vague. The Court of Appeals assumed that the factor was vague, but did not explicitly find the factor vague because, under the circumstances of the case, it was not necessary to reach the issue. Indeed, the court noted that the second eligibility factor, conviction of murdering two or more individuals, was sufficient to warrant imposition of the death penalty. Moreover, assuming the first factor was unconstitutionally vague, admission of evidence pertaining to that factor did not improperly infect the jury's deliberations because under Illinois law, the nature and circumstances of the murder were permissible factors for the jury to consider under other, permissible statutory factors.

Abbott v. U.S., No. 99-1069 (7th Cir. 10/29/99). On appeal from the denial of his §2255 petition, the petitioner argued that the government did not disclose prior to his trial the fact that its two key witnesses had received promises of leniency in exchange for their testimony. Moreover, the petition alleged that the prosecutor knew that the testimony of the witnesses at trial denying the existence of the agreement was perjurous. In support of his petition, the petitioner presented documentary evidence at the evidentiary hearing before the district court. Specifically, he presented affidavits and letters all of which indicated that a leniency agreement had in fact been reached. Moreover, at the evidentiary hearing, when one of the witnesses was asked if an agreement had in fact existed, he refused to answer, invoking his Fifth Amendment privilege. Despite the evidence produced by the petitioner, the Court of Appeals affirmed the district court's denial of the petition because that denial was based on the resolution of questions of credibility. Specifically, the district court chose to credit the testimony of the prosecutor, an ATF agent, and the county State's Attorney, all of whom denied the existence of an agreement. Thus, although acknowledging that the evidence "was not entirely consistent," the Court of Appeals stated that "arguments merely urging a reevaluation of a district court's credibility determinations are wasted on an appellate court."

Bell v. Clark, No. 98-4071 (7th Cir. 10/04/99). After the Court of Appeals denied a habeas petitioner a certificate of appealability, he filed a pleading seeking return of his $5 filing fee and $100 docketing fee, arguing that because he was denied leave to appeal, his money should be returned. The court, however, disagreed and held that "[t]here is no refund of a filing fee just because an appellant, petitioner, or other seeker of judicial review is dissatisfied with the outcome of his quest, whether that outcome is defeat on the merits or a refusal, for jurisdictional or other reasons, even to consider the merits."

INEFFECTIVE ASSISTANCE

Robinson v. U.S., No. 98-2055 (7th Cir. 11/3/99). On appeal from the district court's denial of a §2255 petition, the Court of Appeals affirmed the district court's finding that the petitioner was not prejudiced by any errors committed by trial counsel. First, although the petitioner claimed that his attorney failed to investigate or interview witnesses before advising him to plead guilty, the petitioner failed to show that the results of any such investigation would have changed his decision to plead guilty. Indeed, given that the government's case included testimony from the petitioner's co-conspirators and a tape recording of the petitioner discussing his criminal activity, any investigation would not have changed the petitioner's decision to plead guilty. Second, although the petitioner claimed that his attorney misinformed him about the nature of his 20 year minimum sentence, this error was not prejudicial because at the petitioner's change of plea hearing, the district court explicitly informed him as to the correct minimum and maximum sentences. Finally, although the petitioner claimed that counsel failed to object to three criminal history points resulting in a sentence 32 months greater than he should have received, the court held that a "maximum difference of 32 months fails to meet the constitutional standard of prejudice."

JURY INSTRUCTIONS

U.S. v. Hill, (7th Cir. 11/12/99). In prosecution for possession with intent to distribute crack, the Court

of Appeals held that the defendant was not entitled to an instruction on the lesser-included offense of simple possession because, in addition to the amount involved (20 grams), nothing in the record suggested that the defendant possessed the crack for his own use. Having quickly decided the merits of the appeal, the court then used this case to "clarify three recurrent issues in cases involving the question of whether to give a lesser-included instruction." First, noting that this circuit has not yet indicated what the precise standard of review is in such cases, the court definitively held that the proper standard of review was for an abuse of discretion. The court noted, however, that for all practical purposes, there really exist only two standards of review–deferential and non-deferential. Second, the court reiterated that possession is a lesser-included offense of possession with intent to distribute. Finally, the court explicitly held that "a defendant who presents an exculpatory defense (that he didn't possess the crack, let alone with intent to distribute it) is not entitled to a lesser-included instruction.

JURY SELECTION

U.S. v. Osigbade, No. 99-1110 (7th Cir. 10/26/99). In prosecution for distribution of heroin, the Court of Appeals rejected the defendant's claim that the district court's mistaken dismissal of a venire person and potential juror denied or impaired his Fifth Amendment due process right to intelligently exercise his peremptory challenges. During jury selection, the district court mistakenly dismissed a juror whom it believed had been struck for cause by the government. When it was discovered that the juror had in fact not been stricken by either side, the juror had already left the building and the district judge refused to delay the trial to allow her to be recalled. Rather, the judge placed another juror on the panel to whom no party had previously objected. On appeal, the defendant argued that any impairment of the right to exercise peremptory challenges requires automatic reversal according to United States v. Underwood, 122 F.3d 389, 392 (7th Cir. 1997). The Court of Appeals, however, refused to read Underwood so broadly. Although the court specifically found that under the facts of this case, the defendant's right to exercise peremptory challenges was not impaired because he was allowed to exercise his full allotment of challenges and no one was seated over his objection, the court implied that, even where the right is impaired, Underwood does not require automatic reversal in every case.

PRE-INDICTMENT DELAY

U.S. v. Hunter, No. 99-1963 (7th Cir. 11/23/99). In prosecution for possession of checks stolen from the United States Mail, the defendant argued that the district court abused its discretion by refusing to dismiss the indictment against him due to pre-indictment delay. After the defendant was originally arrested on a criminal complaint, the defendant was released on bond. Shortly thereafter, the government moved to dismiss the complaint because it was finalizing an information and discussing a proposed plea agreement with the defendant. After the complaint was dismissed, however, the government took four years to finally indict the defendant. Thus, the defendant argued that this delay deprived him of his due process right to a fair trial because he had little or no recollection of the events charged in the indictment due to memory loss occasioned by heavy alcohol and drug abuse during the time alleged in the indictment. In rejecting this challenge, the Court of Appeals noted that a defendant has a stringent burden in cases where he alleges that pre-indictment delay deprived him of his rights; he must do more than make hollow allegations of prejudice. In the present case, nothing in the record but the defendant's self-serving affidavit pointed to any memory loss. Moreover, tape recordings existed of many of the illegal transactions upon which the government relied at trial. Thus, under the circumstances, the district court did not abuse its discretion in denying the motion to dismiss.

RULES OF APPELLATE PROCEDURE

Normand v. Orkin, No. 98-4111 (7th Cir. 10/12/99). In this civil case, the Court of Appeals issued a rule to show cause why an attorney failed to comply with Circuit Rule 30(d). Although counsel's brief contained a certificate of compliance with Rule 30(d), the appendix in fact did not contain a copy of the district court's order as required by the rule. Accordingly, even though the court recognized that the attorney was inexperienced in federal litigation, counsel was ordered to show cause within 14 days why he should not be fined $1,000 for his violation of the Rule. [Because Circuit Rule 30(d) applies to criminal appeals as well as civil, this case is included as a warning to the wise].

SENTENCING

Damerville v. U.S., No. 98-1057 (7th Cir. 11/23/99). In a habeas corpus challenge, the petitioner argued that his sentence as a "career offender" was improper because the government failed to comply with the procedural notice requirements as

set forth in 21 U.S.C. § 851. The Court of Appeals, in rejecting the challenge, noted that the procedural requirements set forth in section 851 apply only to the statutory recidivism enhancements for specified drug offenses under 21 U.S.C. § 841(b). The "career offender" enhancement, however, is not pursuant to this statutory section, but is made instead pursuant to United States Sentencing Guideline Section 4B1.1. Thus, consistent with the reasoning of other circuits, the Court of Appeals held that the government need not comply with section 851 when enhancing a defendant's sentence under U.S.S.G. §4B1.1 rather than 21 U.S.C. §841(b).

U.S. v. Chimilewski, (7th Cir. 11/18/99). In prosecution for giving a bribe to OSHA employees in exchange for the dropping of fines for OSHA violations, the Court of Appeals affirmed the defendant's sentence. Although the defendant paid the OSHA employees a total of $2000 in bribes, he did so in hopes that the employees would eliminate $35,000 in fines. Thus, the district court determined the defendant's base offense level using the $35,000 figure. The Court of Appeals affirmed, holding that the proper amount to use for calculating the base offense level is the amount of benefit that the defendant thought he would receive via his bribes.

SUFFICIENCY OF THE EVIDENCE

U.S. v. Polin, No. 98-4264 (7th Cir. 10/20/99). In prosecution for conspiring to pay kickbacks for the referral of Medicare patients in violation of 42 U.S.C. § 1320a-7(b)(2), the Court of Appeals affirmed the district court's denial of the defendants' motion for judgment of acquittal. The evidence at trial showed that the defendants, a doctor and a nurse, offered a pacemaker sales representative a $50 kickback for every patient the salesperson recommended to the defendants' clinic for required pacemaker monitoring. This recommendation would, however, have to be approved by the patient's treating physician, who would then "refer" the patient to the clinic for monitoring. Given this arrangement, the defendants argued that the evidence failed to show they offered a kickback for a "referral," because the kickback was paid to the sales representative who could only "recommend" the clinic. In rejecting this argument, the Court of Appeals found that the defendants' interpretation of the Act would mean that only a physician could violate the "referral" provisions of the act, while only laypersons could violate the "recommend" provisions of the Act. According to the court, such a reading misinterpreted the Act, for the "referral" and "recommend" sections of the Act did not distinguish between physicians and laypersons, but rather distinguished only the referral of a patient from the recommendation of medical services. Thus, the defendants were properly convicted of receiving kickbacks for referrals by the sales representative.

WAIVER

U.S. v. Franklin, No. 98-3014 (7th Cir. 11/22/99). In prosecution for racketeering and narcotics conspiracies, the Court of Appeals held that the defendant failed to properly preserve the question of whether the district judge should have recused himself. Although the defendant filed a proper motion to recuse the district judge pursuant to 28 U.S.C. §455(a) in the district court, upon denial of that motion, the defendant failed to immediately move for a writ of mandamus. Accordingly, given that a failure to request the writ constitutes a waiver of the recusal argument, the Court of Appeals refused to consider the argument on direct appeal after conviction.

RECENT NON-SUMMARIZED CASES

Current from October 4, 1999 to present

U.S. v. Blassingame, No. 98-3358 (7th Cir. 11/23/99) (affirming racketeering convictions despite defendants' claims related to an entrapment defense).

U.S. v. Taylor, No. 98-2767 (7th Cir. 11/16/99) (affirming defendant's conviction where the defendant was not coerced into consenting to a search of his home and delay in bringing him to trial was the result of defendant's repeated demands for new trial counsel).

U.S. v. Hegge, No. 98-4232 (7th Cir. 11/5/99) (dismissing an appeal for lack of jurisdiction where defendant challenged the district court's refusal to downwardly depart but knew that it could do so).

U.S. v. Branch, No. 98-2793 (7th Cir. 10/28/99) (affirming district court's determination that defendant distributed "crack" rather than powder and that the defendant obstructed justice and did not accept responsibility).

U.S. v. Faison, No. 99-1103 (7th Cir. 10/26/99) (affirming denial of motion to suppress where trooper searched a truck after he stopped it for speeding, discovered that the driver did not have the necessary paperwork, and smelled a common making agent of drugs).

U.S. v. Griffin, No. 98-4016 (7th Cir. 10/14/99) (affirming a drug distribution conviction where the appeal raised 11 issues).

Rodriquez v. Scillia, No. 98-2395 (7th Cir. 10/13/99) (affirming the district court's denial of a habeas petition, finding that the petitioner's failure to raise issues in his petition for leave to appeal to the Illinois Supreme Court procedurally defaulted his claims and that there was no risk of a fundamental miscarriage of justice in barring review of the claims).

Britz v. Cowan, No. 98-3476 (7th Cir. 10/04/99) (affirming denial of capital habeas petition where only error of state law was alleged, ineffective assistance of trial counsel was waived by failure to raise it in direct state appeal, ineffective assistance of appellate counsel claim was waived by failure to raise it in state post-conviction proceeding, and waiver could not be "forgiven" because petitioner could not establish that he was "actually innocent" of the murder).

The Back Bencher

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ATTACHMENT

FEDERAL PUBLIC DEFENDER
CENTRAL DISTRICT OF ILLINOIS

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ASSISTANT FEDERAL PUBLIC DEFENDER

The Federal Public Defender for the Central District of Illinois is accepting applications for the position of Assistant Federal Public Defender for its Peoria office. The Federal Public Defender, a branch of the United States Courts, operates under authority of the Criminal Justice Act, 18 U.S.C. §3006A, to provide defense services in federal criminal cases and related matters in the federal courts.

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Richard H. Parsons
Federal Public Defender
400 Main Street, Suite 1500
Peoria, IL 61602

NO TELEPHONE CALLS OR FACSIMILES ACCEPTED

Position open until filled

AN EQUAL OPPORTUNITY EMPLOYER
Women and Minorities Encouraged to Apply

ATTACHMENT

OFFICE OF THE FEDERAL PUBLIC DEFENDER
CENTRAL DISTRICT OF ILLINOIS
PEORIA

POSITION ANNOUNCEMENT

RESEARCH AND WRITING SPECIALIST (ATTORNEY)

The Office of the Federal Public Defender, an agency of the United States Courts, is accepting resumes for a Research and Writing Specialist. The Federal Public Defender provides legal representation to individuals charged with federal criminal offenses and who are unable to afford counsel. This position will become available in January 2000.

The Research and Writing Specialist is an attorney position. Applicant must be a member in good standing of any state or federal bar, and should have sufficient experience to write briefs and memoranda suitable for filing in the United States District Court for the Central District of Illinois or the United States Court of Appeals for the Seventh Circuit.

The Research and Writing Specialist will not ordinarily sign pleadings or make court appearances, and may not engage in the private practice of law.

This is a federal employee position subject to the Judiciary's salary scale and benefits. Dependent upon qualifications and experience, the position grade will start at JSP-9 through JSP-15 (currently $33,026 to $79,162).

Submit resume, two (2) writing samples and professional references to:

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